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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-530

RAPHAELA MARTINEZ,
Administratrix ad Prosequendum and
General Administratrix of the Estate of
Miguel Martinez, Jr., deceased,

Petitioner,

vs.

LAWRENCE SCHROCK, M.D. and
ANKIA CHANDRASEKARAN, M.D.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

Petitioner, Raphaela Martinez, Administratrix ad Prosequendum and General Administratrix of the Estate of Miguel Martinez, Jr., deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered June 25, 1976, affirming the judgment of the United States District Court dismissing the within action, and that on hearing that judgment be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals, included in Petitioner's Appendix at page A-1, is now reported at 537 F.2d 765.

The letter opinion of the United States District Court is included in Petitioner's Appendix at A-20.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1976. This Court has jurisdiction under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Respondents, two Army surgeons, are immune from suit for medical malpractice allegedly committed upon Petitioner's decedent, an Army retiree entitled to the services of Army medical personnel.

STATEMENT OF THE CASE

This is an action for wrongful death as a result of medical malpractice originally instituted by plaintiff,

Raphaela Martinez, Administratrix ad Prosequendum and General Administratrix of the Estate of Miguel Martinez, Jr., against defendants who were at all times relevant herein, Army doctors, in the Superior Court of New Jersey, Law Division, Ocean County. (Appendix, p. A-22). The case was removed to the United States District Court for the District of New Jersey on petition of the United States Attorney (Appendix, p. A-25). Thereafter, the United States Attorney moved to dismiss plaintiff's complaint on the ground that defendants were immune from actions such as the one brought by plaintiff (Appendix, pp. A-29, 33), which motion was granted by the District Court (Appendix, p. A-46). Plaintiff thereupon took an appeal to the United States Court of Appeals for the Third Circuit (Appendix, p. A-47). The matter was first argued before Chief Judge Seitz and Judges Aldisert and Gibbons on June 3, 1975, and reargued before the entire Court *en banc* on May 14, 1976 (Appendix, p. A-1). On June 25, 1976, the Court of Appeals, in an opinion from which Chief Judge Seitz and Judge Gibbons dissented, affirmed the judgment of the United States District Court dismissing the within action (Appendix, p. A-1).

On or about January 20, 1974, plaintiff's decedent, Miguel Martinez, a retired U.S. Army Sergeant and a civilian employee at the Army installation at Fort Dix, New Jersey, entered Walson Army Hospital at Fort Dix and became a patient of defendants, Army doctors practicing medicine there. On January 21, 1974, defendants performed a gall bladder operation on plaintiff's decedent in a negligent and improper manner, thereby causing plaintiff's decedent to contract an infection which defendants improperly diagnosed and treated. Subsequently, on January 23, 1974, plaintiff's decedent expired at Walson Army Hospital.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals below holding that Respondents, Army physicians, are immune from suit for medical malpractice arising out of services rendered by them to Petitioner's decedent, an Army retiree entitled to such services, is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in the case of *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Circuit 1974), a case whose facts are virtually identical to the facts of the case *sub judice*.

In *Henderson*, the plaintiff, the dependent wife of a member of the armed services, brought a suit against Major George Bluemink, an Army doctor, for alleged negligence in treating and diagnosing plaintiff's illness, while she was an out-patient at Walter Reed Medical Center. Defendant moved before the United States District Court for Summary Judgment dismissing plaintiff's Complaint, which Motion was granted. Thereafter, the plaintiff appealed to the United States Court of Appeals for the District of Columbia Circuit, which reversed the Judgment of the District Court and remanded the case for trial, holding that an Army physician was not immune from civil suit for malpractice allegedly committed upon the dependent wife of a serviceman, who was treated by him in an Army hospital as part of his official duties. In arriving at this conclusion that Court reasoned as follows:

> "Turning to the facts of the instant case, we cannot say that the District Court was asked to review federal policy decisions made by appellee in the area of health. Rather, the complaint (no less—but certainly no more—than one sounding in malpractice) charged that appellee, albeit a government officer, was

negligent in the practice of medicine. Since appellee is neither a judge nor an executive officer, and is therefore clothed at best with a limited form of immunity, we reject the conclusion of the District Court that appellee's employment by the Army as a medical officer confers absolute immunity for his allegedly tortious conduct. That court's perception of appellee's governmental employment as the dispositive factor in the litigation is to us merely the point of departure. To be sure, the acts complained of involved the exercise of discretion in the normal usage of that term but the significant factor is that the discretion exercised might have been medical rather than governmental. The chief policy underlying the creation of immunity for lower governmental officials is mainly that which stems from the desire to discourage 'the fearless, vigorous, and effective administration of policies of government.' However, that policy is not applicable to the exercise of normal medical discretion since doctors making such judgments would face the same liability outside of government service as they would face if the complaint below is upheld. *A fortiori*, the threat of liability for negligence would not deter the fearless exercise of medical discretion within government service any more than the same threat deters the exercise of medical discretion outside of government. Holding government medical personnel to the same standards of care which they would face outside of government service in no way burdens their public responsibility or deters entry into government service or the vigorous exercise of public responsibility once having entered that service." 511 F.2d, 399, 502-403. (Citations and footnotes omitted.)

The Court in *Henderson* recognized that the acts complained of in that case involved the use of judgment and discretion, but found that discretion to be medical rather than governmental and therefore not clothed with the mantle of immunity. The court also noted that the

compulsory exercise of medical discretion by a government physician (medical judgments required because of government service which might be avoided outside of government service) might alter the standards of care applicable to the exercise of medical discretion or give rise to a limited immunity, but found factually that such was not the case with respect to defendant's actions therein.

The Court of Appeals in the instant matter, in reaching the conclusion that an Army physician is immune under such circumstances, failed to distinguish or even to mention, except in a footnote, the opinion of the District of Columbia Circuit in *Henderson v. Bluemink*, *supra*., although that case was urged upon the Court in support of Petitioner's position. Instead, the Court below held that for purposes of the immunity doctrine, a claim by a retired military person is to be equated with the claim of an individual in active service against military personnel. As Chief Judge Seitz noted in his dissenting opinion, this holding represents an attempt to avoid the applicability of *Barr v. Matteo*, 360 U.S. 564 (1959) in which this Court held that for absolute immunity to apply, the government official must (1) be a policy-making executive official and (2) be acting within the outer perimeters of his line of duty. The majority relied instead upon *Feres v. United States*, 340 U.S. 135 (1950), which is not applicable to claims other than those brought by an active duty serviceman and clearly does not apply to the claim of a retired serviceman. Compare, *United States v. Brown*, 348 U.S. 110 (1954).

It is respectfully submitted that the reasoning adopted by the Circuit Court of Appeals for the District of Columbia in *Henderson v. Bluemink*, *supra*, is equally applicable to the facts herein and that the Court of Appeals for the

Third Circuit erred in reaching the opposite conclusion in the instant case. Inasmuch as the decision of the Court below is in direct conflict with the earlier decision of the Circuit Court of Appeals for the District of Columbia on virtually identical facts presenting the same legal issue, to wit: whether an Army physician is immune from suit for malpractice by a non-active duty patient entitled to his services, it is respectfully urged that this case warrants the exercise of this Court's discretion in granting this writ.

II

The decision of the Third Circuit Court of Appeals in the within matter conflicts, not only with the decision of the Court of Appeals for the District of Columbia in *Henderson v. Bluemink, supra.*, but in addition, conflicts with earlier decisions of this Court, particularly this Court's landmark decision in *Barr v. Matteo*, 360 U.S. 564 (1959). As noted above, *Barr* limits the application of absolute immunity to government officers who are policy-making executive officials acting within the outer perimeter of their line of duty. Clearly, Respondent's, who are active duty Army physicians, do not fall within this class of government officials.

In attempting to avoid the applicability of *Barr v. Matteo, supra*, the Court below mistakenly applied another decision of this Court, *Feres v. United States*, 340 U.S. 135 (1950), where in was stated:

> "We know of no American law which ever has permitted a soldier to recover for negligence against either his superior officers or the government he is serving." 340 U.S. 135, 141.

This holding in *Feres* was later limited to active duty service personnel by the holding in *United States v.*

Brown, 348 U.S. 110, (1954) a suit identical to that in *Feres*, except that the plaintiff was a discharged serviceman, which distinguished *Feres* on that very basis.

It is respectfully submitted, based on the foregoing, that the Third Circuit Court of Appeals in its opinion in the case *sub judice*, clearly misapplied this Court's holding in *Feres v. United States, supra* and erred in not applying the doctrine enunciated by this Court in *Barr v. Matteo, supra* and in not finding, based on that doctrine, that Respondents were not immune from Petitioner's suit. It is therefore respectfully urged that the writ sought in the within matter be granted by this Court.

III

As the majority opinion below notes, the principals of absolute and qualified immunity for government officials have been developed largely by this Court, rather than by Congress. Periodically, this Court has undertaken to define the limits of this immunity and designate the officials to whom it applies and the extent of its application. *Barr v. Matteo, supra, Doe v. McMillian*, 412 U.S. 306 (1973). At the present time, in light of increasing general concern over the issue of medical malpractice claims and malpractice insurance costs, it is respectfully submitted that the issue in the case *sub judice*, whether and to what extent Army physicians are immune from suit for malpractice, presents an important question of Federal law which has not been, but should be settled by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted by this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-2296

RAPHAELA MARTINEZ, Administratrix ad Prosequendum and General Administratrix of the Estate of Miguel Martinez, Jr., deceased,

Appellant,

v.

LAWRENCE SCHROSK, M.D. and
ANKIA CHANDRASEKARAN, M.D.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 74-1282)

Argued June 3, 1975
Before: SEITZ, *Chief Judge*, ALDISERT and GIBBONS, *Circuit Judges.*

Reargued May 14, 1976
Before: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

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OPINION OF THE COURT OF APPEALS
Filed June 25, 1976

ALDISERT, *Circuit Judge.*

Bailey v. DeQuevedo, 375 F.2d 72, 74 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967), held that "an enlisted man in the armed services of the United States cannot maintain an action against an Army medical surgeon for negligence in an operation performed at an Army hospital in line of duty." The question presented here is whether that bar can be extended to an action brought by the representative of a retired enlisted man against two Army surgeons. The district court held that the surgeons possessed immunity and dismissed the complaint with prejudice. We affirm.

Plaintiff's decedent, a retired Army sergeant and a civilian employee at Fort Dix, New Jersey, died on January 23, 1975, shortly after a gall bladder operation performed on him by defendants, two Army surgeons. Plaintiff initiated survival (N.J.S.A. 2A: 15-3) and wrongful death (N.J.S.A. 2A: 31-1) claims in the Superior Court of New Jersey contending that defendants' negligence caused the death. The action was properly removed to the district court pursuant to 28 U.S.C. § 1442(a) where it was dismissed with prejudice. The district court relied on the immunity doctrine enunciated in the defamation case of *Barr v. Matteo*, 360 U.S. 564 (1959) and later applied in this circuit in *Keiser v. Hartman*, 339 F.2d 597 (3d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). Plaintiff appealed the order of dismissal.

Our starting point is the *Bailey v. DeQuevedo* rationale,[1] anchored not on *Barr v. Matteo* but on *Feres v.*

1. We cheefully concede that the *Bailey* rationale has not captured universal acceptance. *See, e.g., Henderson v. Bluemink*, 511 F.2d 399 (D.C. 1974).

United States, 340 U.S. 135, 141 (1950): "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." In denying relief to the plaintiff in *Bailey* our justification was two-fold: "the *plaintiff was on* 'active duty' and 'subject to military discipline,' and the *defendant's* alleged negligent action was 'committed in the course of military duty.'" 375 F.2d at 74 (emphasis added). Here we must decide if a different rule should apply because: (a) the survival claim is asserted on behalf of a retired serviceman, entitled to military medical care but no longer on active duty at the time of the alleged negligent conduct or (b) the wrongful death claim, in legal theory, belongs to the decedent's family, not to the decedent.

We concede that the distinction in the status of plaintiff and her decedent deprives these defendants of the benefit of the rationale that "one soldier may [not] sue another for negligent acts performed in the line of duty." *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948 (1966), quoted in *Bailey v. DeQuevedo, supra*, 375 F.2d at 74. But we do not believe that the applicability of immunity doctrines ought to turn on such distinctions. We perceive more meaningful policy considerations at work—considerations looking not to the particular status of the *plaintiff*, but to the governmental interests inhering in the duties of the *defendants*. The Supreme Court instructs:

> [T]he Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government *in particular contexts* outweigh the perhaps recurring harm to individual citizens . . . .

Doe v. McMillan, 412 U.S. 306, 320 (1973) (emphasis added). In particular, two considerations are to be counterbalanced:

> [O]n the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Barr v. Matteo, supra, 360 U.S. at 565; *see Doe v. McMillan, supra*, 412 U.S. at 319.

Applying these broad directives from the Supreme Court, we perceive significant public policy considerations at work here which tip the balance in favor of immunity.

First, as in *Bailey*, the defendants here were Army physicians on active duty, performing "in the course of military duty." They could not pick and choose their patients. The objectives of certainty and uniformity in the law would be ill-served if immunity were wrapped around a surgeon for a nine o'clock operation in an Army hospital on an active-duty soldier who survived the operation, but were removed for a ten o'clock operation in the same operating room on a retired soldier who did not survive the operation. The law should not require the military surgeon, in exercising his informed medical judgment, to concern himself with his patient's military status or with the technicalities of tort law. The same standard of professional care obviously ought to apply in both situations, and the same legal rules should obtain.

Second, if viewed from the perspective of avoiding "perhaps recurring harm to individual citizens," the plaintiff's position in this case is equally untenable. Immunizing these defendants from personal liability does not deprive the plaintiff of a remedy: she may seek relief under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), see *United States v. Brown*, 348 U.S. 110 (1954). Indeed, we were advised at oral argument that a timely Federal Tort Claims Act claim has been filed to protect the plaintiff. In *Bailey* we held the defendants were immune from personal liability even though the plaintiff was precluded from suing under the Federal Tort Claims Act. See *Feres v. United States, supra*. There was no alternative remedy in *Bailey;* there is in the case at bar. Insofar as this factor should affect the outcome, our decision today would seem to follow *a fortiori* from *Bailey*.

Third, concerning the contribution of an immunity rule to "effective government," we note that this claim is not one where liability would be borne ultimately by the United States or by an insurance carrier. Absent a Federal Tort Claims Act suit naming the United States as a defendant, there is no provision for joinder of or indemnity from the United States; and malpractice insurance is not involved here.[2] This case raises the spectre of *personal* liability on the part of military doctors.

We willingly concede that concern for the savings accounts of military doctors should not be controlling in and of itself. But viewed with regard for its possible effect on the delivery of health care to the armed services, the prospect of personal liability takes on added significance. Surely, there is a strong governmental interest in assuring that the military services be able to recruit and retain

2. See the Report of the House Committee on Armed Services, note 5, *infra*, concerning the reasons why a plaintiff might choose not to sue the United States, and the general absence of malpractice insurance in this kind of litigation.

competent medical personnel. Given today's litigious medical malpractice environment,[3] we believe that such persons would be substantially discouraged from pursuing military medical careers by the prospect of personal liability in malpractice actions. Civilian physicians are having difficulty meeting the spiralling cost of malpractice insurance premiums.[4] Some have felt compelled to leave previously lucrative practices. It could hardly be suggested that the purchase of costly insurance would provide a solution for the more modestly compensated military doctor. Therefore, if there is a governmental interest in the delivery of health care to the armed services—and we strongly believe there is—a result imposing personal liability on military medical personnel would be antithetical to that interest.

Finally, to argue, as does the plaintiff, that the protection of military medical officers is a matter for Congress,[5] and not for the courts, is to ignore the reality that

3. *See, e.g.*, New York Times, June 15, 1975, at 44, col. 3 (remarks of Dr. Malcolm C. Todd, president of the American Medical Association ("A.M.A."), during the 124th Annual Meeting of the A.M.A.): "Malpractice is the number one problem that faces the American medical profession."

4. "The A.M.A. undertook the financial risk of forming a re-insurance company under pressures created by soaring malpractice premium rates and by the commercial industry's virtual abandonment of medical malpractice coverage." New York Times, June 20, 1975, at 39, col. 5. In the 10-year period prior to the A.M.A.'s action, rates jumped 1,600%, so that the annual premium for $1 million insurance coverage came to nearly $15,000 for high risk fields such as orthopedic surgery—and this figure obtained before carriers proposed doubling rates in 1975. New York Times, June 1, 1975, at 47, col. 5.

5. The House of Representatives has passed H.R. 3954, 94th Cong. 1st Sess., to provide an exclusive remedy via the Federal Tort Claims Act for claims against active duty military physicians, dentists, nurses, pharmacists and paramedical personnel. Such protection had already been extended to medical personnel of the Veterans Administrations, 38 U.S.C. §4116, and of the Public Health Service, 42 U.S.C. §233.

The House Committee on Armed Services Report accompanying H.R. 3954 explained the problem:

> . . . If the defendant loses the case *he* must pay the judgment. Of course, if the individual is sued jointly with the United States and a judgment is entered against both jointly, the United States will satisfy the judgment. However, if the defendant is sued individually, neither the

it has been the Supreme Court, not Congress; that has developed the principles of absolute immunity,[6] as well as the principles of qualified immunity.[7] Moreover, such an argument ignores the fact that it was this court, not Congress, that afforded protection to military physicians from claims by persons on active military duty. *Bailey v. DeQuevedo, supra.*

We see the issues reduced to this: being limited to the salary of a military officer without the financial emoluments of private civilian practice, and being under military obligation to accept patients sent to him, should a

United States nor the individual can bring in the United States as a party defendant in order to invoke the provisions of the Federal Tort Claims Act.

One may ask why a plaintiff would not join the United States or sue the United States alone in order to claim the benefit of the world's largest self-insurer. There are several possible reasons. For example, a jury trial is not available in such a suit against the United States and the plaintiff may care to obtain jury consideration of the circumstances giving rise to the alleged malpractice. . . . Also, there are cases where the two-year statute of limitations on claims against the United States may have run out while the local statute for suit in a state court may not have run. In addition, there have been instances where for emotional or vindictive reasons plaintiffs have insisted on suing a physician personally for alleged negligence.

The present propensity of individuals to pursue more actively alleged medical malpractice and the attendant alarming increase in the cost of malpractice insurance coverage have caused physicians, dentists, nurses, paramedics and other individuals assigned to medically-related duties in the Department of Defense to be increasingly concerned over personal exposure to civil liability for alleged malpractice and their increasing inability to meet the cost of malpractice insurance.

The Department of Justice reported to the Committee that it is defending 20 such lawsuits in which 37 Defense Department defendants are being sued personally for damages in United States District Courts. In all but three cases there is no insurance coverage, and of those three the limitations on liability appear to fall well below the damages claimed. The total damages claimed in those 20 cases is in the amount of $13,755,450.00. The Department of Justice, in reporting its experience regarding the national proliferation of medical malpractice claims and litigation, has advised the Committee that at the present time it is involved in approximately 494 suits characterized as arising out of alleged medical malpractice of officers or employees of the Federal establishment.

H.R. Rep. No. 94-333, 94th Cong., 1st Sess. 2-3 (1975).

6. *Imbler v. Pachtman*, — U.S. —, 44 U.S.L.W. 4250 (March 2, 1976); *Doe v. McMillan*, 412 U.S. 306 (1973); *Pierson v. Ray*, 386 U.S. 547 (1967); *Barr v. Matteo*, 360 U.S. 564 (1959).

7. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray, supra*, note 6.

military physician be confronted with potential personal liability for a claim of medical malpractice? Would such liability be consonant with sound public policy? We think not. We think that the contribution of immunity to effective government, relating here to the armed services' ability to recruit and retain competent medical personnel, outweighs the perhaps recurring harm to individual citizens who, in fact, have recourse under the Federal Tort Claims Act.

The judgment of the district court will be affirmed.

ADAMS, *Circuit Judge*, concurring in the result.

I concur in the judgment of the majority, but since I take a different route to arrive at the result, I write separately to state my views.

A.

The facts presented in *Bailey v. DeQuevedo*[1] may appear, at first blush, to resemble those of the present case rather closely, since both concern medical malpractice actions brought against physicians employed on a full-time basis by the United States Army. A distinction between the cases exists, though, by virtue of the different relationships the two injured parties bore to the military. Bailey was on active duty in the armed forces, and as a practical matter had no choice as to which doctor to utilize. Martinez, on the other hand, was retired, and had the option of going to an Army doctor or to a civilian one.

The distinction is an important one, since the rationale utilized by the Court in *Bailey* was that of *Feres v. United States*,[2] a Supreme Court decision that also involved tort suits by persons who had been on active military duty at

1. 375 F.2d 72 (3d Cir.), *cert denied*, 389 U.S. 923 (1967).
2. 340 U.S. 135 (1950).

the time of their injuries. The suits in *Feres* were not brought against individual defendants, as in *Bailey*, but against the government, under the Federal Tort Claims Act. Focusing upon the unique "relationships of military personnel to the Government,"[3] the Supreme Court held the sovereign immune from suits brought under the Act by servicemen "where the injuries arise out of or are in the course of activity incident to service."[4]

When, several years later, the Supreme Court was faced in *United States v. Brown*[5] with a suit identical to that in *Feres*, except that the plaintiff was a *discharged* veteran—precisely the difference that exists between Bailey and Martinez—it expressly distinguished *Feres* on that basis. Because Brown was not on active duty when he was injured, the proceedings were allowed to go forward. The Supreme Court observed that the rationales underlying the result in *Feres*—"[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty"[6] —did not apply to actions brought by military personnel not on active duty. In so doing, the Court specifically "adhere[d] . . . to the line drawn in the *Feres* case"[7] between injuries that arose in the course of active military duty and those that did not.

The Bailey *Court recognized that* Feres was not precisely on point, since the defendants in *Bailey* were the allegedly negligent physicians rather than the government, but it nonetheless adopted the *Feres reasoning*.[8]

3. *Id.* at 146.
4. *Id.*
5. 348 U.S. 110 (1954).
6. *Id.* at 112.
7. *Id.* at 113.
8. 375 F.2d at 74.

Significantly, the Court then proceeded to point out the difference between *Feres* and *Brown*, in order to demonstrate that the former rather than the latter was the correct analogue to Bailey.[9] The case before us today is closer to *Brown* than to *Feres*, however, since Martinez was not on active duty at the time of the operation in question, and of course his executor was not on duty at the time of suit. As such, the *Brown* holding would appear to be more persuasive than that of *Feres*, which applied a rule of absolute immunity.

I thus conclude that *Bailey* does not require that we automatically immunize the defendants here. Consequently, I cannot agree with the determination of the majority that *Bailey* should be the starting point of the analysis or with the implication that *Bailey* is binding.

B.

Even if *Bailey* could stand for the proposition that Army physicians are absolutely immune from a suit brought by retired military personnel, it ought not govern the result here. The decision in *Bailey* came at a time when government officials with discretionary duties "enjoyed an absolute immunity from damage suits" [10] if they were acting "within the outside perimeter of [their] line of duty. . . ." [11] It is not disputed that the physicians here were within such perimeter in performing the operation in question.

In the nine years since *Bailey*, however, the law of immunity has undergone a marked change. One commentator has observed that "[t]he common law doctrines of personal immunity for official acts were revitalized" [12] by

9. *Id.*
10. Note, *Damages for Federal Employment Discrimination*, 85 Yale L.J. 518, 527 (1976).
11. Barr v. Matteo, 360 U.S. 564, 575 (1959) (Harlan, J., announcing the judgment of the Court). *Barr* was the leading case at the time *Bailey* was decided.
12. McCormack, *Federalism and Section 1983*, 60 Va. L. Rev. 1, 10 (1974).

the decision of the Supreme Court in *Pierson v. Ray*,[13] which came down eight days after *Bailey*. Further evolution has occurred since then.[14]

The rule of absolute immunity that prevailed at the time of *Bailey* has been modified by the Supreme Court into a standard of qualified immunity which, as stated in *Scheuer v. Rhodes*,[15] is dependent upon "the scope of discretion and responsibilities of the office and *all the circumstances* as they reasonably appeared at the time of the action on which liability is sought to be based." In view of the all-the-circumstances test that is to be applied, the Supreme Court, as pointed out by the majority, "has not fashioned a fixed, invariable rule of immunity. . . ." [16]

As noted in Chief Judge Seitz's dissenting opinion, a number of the more recent Supreme Court decisions have involved the immunity of policymaking executive officials, and thus are factually distinguishable from the case now before us. The principles and the approach in the extant immunity decisions would appear to be useful in the present context, however, even though the Supreme Court has not addressed such a situation.

13. 386 U.S. 547 (1967).

14. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). *Cf.* Imbler v. Pachtman, 44 U.S.L.W. 4250 (U.S. Mar. 2, 1976).

15. 416 U.S. 232, 247 (1974) (emphasis added). In the words of the Fifth Circuit, "[a]bsolute immunity . . . is a juridicial relic, expressly rejected by the Supreme Court in both *Wood* and *Scheuer*." Jones v. Diamond, 519 F.2d 1090, 1101 (5th Cir. 1975).

It is suggested in Chief Judge Seitz's dissenting opinion that considerations relevant to suits such as *Scheuer* and *Wood*, brought under 42 U.S.C. § 1983, are not applicable to suits such as this, brought against federal officials. It would appear, however, that this Court has expressed a contrary view. Fidtler v. Rundle, 497 F.2d 794, 801 (3d Cir. 1974); Bethea v. Reid, 445 F.2d 1163, 1166 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972).

16. Doe v. McMillian, 412 U.S. 306, 320 (1973). *See* Paton v. LaPrade, 524 F.2d 862, 872 (3d Cir. 1975); Note, *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 220 (1975).

In Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974), the District of Columbia Circuit recognized a distinction between governmental discretion and medical discretion, and declined to immunize the defendant physcian at all.

Thus, in *Doe v. McMillan*,[17] a suit against the Public Printer, the Superintendent of Documents, and others for invasion of privacy, the Supreme Court stated that the doctrine of official immunity insulates "[g]overnment officials of suitable rank for the reason that 'officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." [18] Although the last three words of the quotation do not specifically apply to army physicians, the two conflicting considerations underlying the doctrine of immunity are as applicable to military doctors as to policymaking officials. They are:

> On the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.[19]

The defendant doctors in this case are skilled professionals employed by the government. They must exercise, in the course of their daily employment, a careful discretion,—albeit not precisely of the same type adverted to in *Doe* and *Barr*—that has a direct impact on their patients. It would disserve the public interest if these governmental

17. 412 U.S. 306 (1973).

18. *Id.* at 319 (quoting Barr v. Matteo, 360 U.S. 564, 571 [1959]).

19. *Id.* (quoting *Barr v. Matteo*, *supra* at 565).

physicians had to concern themselves with the possibility of a monetary judgment each time they were faced with a discretionary decision. Thus, it would not seem realistic to suggest, as the reasoning employed by the dissent might, that a government agent in charge of a HUD office in a small town, for example, would be clothed with immunity when determining whether the government should insure a mortgage agreement, but that the chief surgeon at a military hospital in a major metropolis, deciding whether to perform difficult surgery, would not be.

Nor can the absence of congressional legislation repecting this situation be deemed controlling on the question whether the defendants should be immunized. It is true that Congress has specifically given immunity to medical personnel in the Veterans' Administration [20] and the Public Health Service,[21] but has not yet approved the legislation that has been proposed to immunize military medical personnel. But as is often the case, the meaning of the failure to enact legislation is inscrutable: Has Congress chosen to limit immunity to physicians in the Veterans' Administration and Public Health Service? Or has it decided that the scope of immunity already afforded military doctors through judicial decisions is sufficient, so that legislation is unnecessary? [22] It may be that the proponents of the legislation dealing with army physicians wished all such physicians to be immune, regardless of a balancing approach, so that even if no tort action against the government were available or if the harm resulted from

20. 38 U.S.C. § 4116 (Supp. IV, 1974).

21. 42 U.S.C. § 233 (1970).

22. Congress immunized VA doctors in 1965, Act of Oct. 31, 1965, Pub. L. No. 89-311, § 6(a), 79 Stat. 1156, but did not act to immunize PHS doctors until three years after this Court's *Bailey* decision, Act of Dec. 31, 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870. Did Congress assume that army physicians had already been immunized by judicial decision when it addressed the immunity of VA doctors? of PHS doctors? Or did Congress intend specifically to exclude army doctors from protective cloak of immunity? There is no evidence whatsoever to indicate the latter.

a nondiscretionary act—such as failure to remove a sponge —the physician would nonetheless be protected. The legislative pattern cannot be determinative, for "[t]he official immunity doctrine . . . 'has in large part been of judicial making . . .'" [23] In the absence of guidance from the Congress, the courts face no statutory or constitutional obstruction to the interpretation or fashioning of the doctrine.[24]

Since qualified immunity would thus appear to be applicable, it is necessary to follow the all-the-circumstances approach mandated by the Supreme Court in such cases. To do so, we must review the particular facts of this case. After such evaluation, I conclude that the defendants here should be held immune from a suit for damages.

Many of the important factors bearing on this case are set forth rather fully in the majority opinion. In my view, the most determinative ones, in capsule form, are: (1) the defendants were Army physicians on active duty, and as such were required to perform the operation upon Martinez; (2) the plaintiffs have an alternative remedy against the United States under the Federal Tort Claims Act; (3) a holding that the defendants are subject to suit may be unduly harsh, particularly when there is an indication that they do not carry malpractice insurance; and (4) the risk of liability may deter competent physicians from embarking upon a career in the military, a development that would be counter to the national interest.[25]

Were one or more of the relevant factors missing—for example, if no alternative remedy existed—the balance

23. *Doe* v. *McMillian*, *supra* at 318 (quoting *Barr* v. *Matteo*, *supra* at 569).

24. *Id.* at 323.

25. Contrary to the suggestion in Chief Judge Seitz's dissent, these factors would be present each time a retired military person seeks medical care from an army physician; they are not unique to this particular case.

could well be different. But an approach that regards *Bailey* as the controlling precedent and thus supplies absolute immunity in all military situations, or which provides for no immunity in any situation involving army physcians, would not permit the flexibility that would allow us to reweigh the totality of the considerations presented by cases that may arise in the future.

SEITZ, *Chief Judge*, dissenting.

It was long ago said that hard cases make bad law. I think that aphorism is particularly applicable to the result reached by the majority here. Reduced to its essence the majority holds that for purposes of the immunity doctrine a claim by a retired serviceman against military personnel is to be equated with the claim of an individual in active service against military personnel. In this way, the majority attempts to avoid the applicability of *Barr v. Matteo*, 360 U.S. 564 (1959). Instead they rely on *Feres v. United States*, 340 U.S. 135 (1950) which, as the concurring opinion notes, is not applicable to a claim of a retired serviceman arising after his retirement. *Compare United States v. Brown*, 348 U.S. 110 (1954).

No amount of legal legerdemain can obscure the fact that this is a state law claim by a civilian against military personnel. As the Supreme Court held in *Howard v. Lyons*, 360 U.S. 593 (1959), the immunity claim in such cases is a matter of federal law to be formulated by the courts in the absence of Congressional action. In addition, *Howard* teaches that the controlling federal principles governing the existence and scope of such immunity, in the absence of Congressional action, are to be found in *Barr v. Matteo*, above.

In granting summary judgment in favor of defendants, the district court relied on the doctrine of official immunity

enunciated in *Barr v. Matteo*, above, and adopted by this Court in *Keiser v. Hartman*, 339 F.2d 597 (3d Cir. 1964). The majority, as noted, rejects this approach, and, in my view, commits error.

Barr was a libel action against the Acting Director of the Office of Rent Stabilization. There the Supreme Court extended the doctrine of absolute immunity, previously provided as a shield to a cabinet-level official in *Spalding v. Vilas*, 161 U.S. 483 (1896), to one whose position, although somewhat less exalted, involved the operation of a federal agency. The test which emerges from *Barr* is two-fold. For absolute immunity to apply the government officer must (1) be a "policy-making executive official" and (2) be acting "within the outer perimeter of [his] line of duty."

I am convinced that the defendant-doctors are not officials entitled to absolute immunity under *Barr* or subsequent cases.[1] Defendants are clearly not policy making executive officials like the agency head in *Barr*, and thus are not shielded by an absolute immunity. I therefore conclude that the district court erred in holding that defendants were entitled to absolute immunity.

Lesser officials are entitled only to a qualified immunity, the scope of which is related to the nature and extent of their governmental duties, *see Doe v. McMillan*, 412 U.S. 306, 319-20 (1972).[2] There is no rigid formula as to what duties or functions of a public servant carry with

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1. It may be noted that medical personnel in the Veterans' Administration are immune from malpractice suits under 38 U.S.C. § 4116 (Supp. 1973). Similar legislation now pending in Congress would apply to military medical personnel. However, up until this date Congress has not seen fit to adopt this legislation.

2. I need not consider the Supreme Court's recent pronouncements concerning the extent of immunity available to certain public officials in actions under 42 U.S.C. § 1983 (1970), since they were based on considerations not applicable in a case which does not fall under that statute. *See Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

them an entitlement to the protection of a qualified immunity and which do not. Each case must be scrutinized to determine the nature of a public servant's acts. Some of the considerations which may weigh in favor of a finding that certain actions give rise to an official immunity are whether the particular public servant is acting to formulate public policy rather than merely to administer policy decisions, or whether the actions undertaken are broad in scope and prospective in effect, pertain to a large number of persons or to the public in general, and involve the exercise of official discretion. Such actions are considered governmental in nature and, as such, give rise to a qualified immunity. By way of contrast, if the actions in question involve carefully circumscribed or routine application of a policy to particular individuals or situations, they are considered ministerial and do not give rise to governmental immunity.

In this case the acts complained of clearly were not related to the formulation of policy nor to broad decision making with an impact on a wide number of people. Although defendants' acts were discretionary in nature, it is clear that they were imbued, in the words of the court in *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), with *medical* and not *governmental* discretion. I therefore believe that defendants' acts were not governmental in nature and that defendants are not shielded from any liability which may arise out of the performance of those acts under the doctrine of qualified immunity.

The most casual examination of the policy factors relied on in the majority and concurring opinions shows that they are not relevant under controlling principles. Rather than focusing upon the scope of the defendants' authority and the nature of their discretionary duties, both the majority and the concurrence seem to rely instead on

irrelevant factors reflecting the "equities" of the case. Certainly, the fact that the defendants were required to perform this operation, that they lacked malpractice insurance, and that plaintiff may have an alternate remedy does not further the inquiry into whether defendants are deserving of the qualified immunity reserved to lower public officials. Although these considerations may ultimately sway Congress to pass the bill presently before it, it is not for this court to "force" a result which Congress, though afforded the opportunity, has not yet seen fit to enact into law.

I would reverse the judgment of the district court and remand for further proceedings.

GIBBONS, *Circuit Judge*, dissenting

I joined in Chief Judge Seitz's dissenting opinion, but I believe that one consideration requires clarification and emphasis.

In this case we have a state law which provides a rule of decision in the absence of a federal immunity which would supplant it.[1] There is no doubt, of course, that federal law could, subject to due process limitations which need not be explored at this point, immunize all federal employees from state law causes of action for all negligent acts committed in the scope of their federal employment.[2] Heretofore neither Congress nor this Circuit[3] has rec-

1. N.J.S.A. 2A:15-3 (survival claim); N.J.S.A. 2A:31-1 (wrongful death claim).

2. *See, e.g., Howard v. Lyons*, 360 U.S. 593 (1959).

3. I agree with Judge Adams' analysis that *Bailey v. DeQuevedo*, 375 F.2d 72 (3d Cir.), *cert. denied*, 389 U.S. 923 (1967), is certainly not dispositive of the specific immunity issue presented in this case. Instead, like Chief Judge Seitz, I believe that the claimed immunity should not be recognized for the reasons advanced by Judge Bastian in *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974).

ognized the absolute immunity claimed by defendants in this case. But Congress, which has previously immunized the medical personnel of the Veterans Administration [4] and the Public Health Service [5] from the very kind of suit that is the subject of this case, now has under active consideration a bill to extend the same immunity to active-duty military medical personnel.[6] Thus, the issue confronting this court is which law-pronouncing branch of the federal government—the federal courts or Congress—should make the immunity determination.

In *Doe v. McMillan*, 412 U.S. 306 (1972), the Supreme Court, confronted with a virtually identical choice, declined, in the absence of Congressional action, to supplant a cause of action under local law by absolutely immunizing the Public Printer and the Superintendent of Documents. Indeed, *Doe v. McMillan* is an *a fortiori* case since the Speech or Debate Clause of the United States Constitution [7] arguably afforded a constitutional basis for extending immunity to agents of the Congress. In this case there is no such constitutional provision. Moreover, in *Crilly v. Southeastern Pa. Transp. Authority*, 529 F.2d 1355 (3d Cir. 1976), we were asked to supplant local law when the reasons for applying a uniform law of labor-management relations appeared far more persuasive than those given for the extension of absolute immunity to cover these defendants. But in *Crilly* we deferred, and properly so I submit, to Congress which, just as in this case, was simultaneously considering proposed legislation covering the same subject matter.[8]

4. 38 U.S.C. § 4116 (Supp. 1976).
5. 42 U.S.C. § 233.
6. *See* H.R. 3954, 94th Cong., 1st Sess. (1975), which has already been approved by the House of Representatives.
7. Art. I, § 6, cl. 1.
8. 529 F.2d at 1357, 1363.

Instead of deferring to future Congressional judgment on the creation of absolute immunity in this kind of suit, the majority has chosen to weigh the competing policy considerations and to make an essentially legislative judgment. It has done so, however, without the benefit of the interplay of the various competing interests which, by design, appropriately occurs within the legislative arena. Indeed, I strongly suspect that not all of the relevant factors have even been identified, since the record before us does not even disclose, for example, the extent to which army surgeons are paid proficiency or incentive allowances over and above the military pay authorized for their rank.[9] What principled reasons, I ask, make this case such a strong one for judicial legislation when compared to others in which we have refused to create federal common law? Unless those reasons are at least identified, the plaintiff will be justified in suspecting that they are entirely subjective.

9. *See* 37 U.S.C. § 313 (Supp. 1976).

A TRUE COPY:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit.

(A.O.—U.S. Courts, International Printing Co.,
Phila., Pa.)

LETTER OPINION OF THE UNITED STATES DISTRICT COURT

October 23, 1974

Novins, Novins, Farley & Grossman,
202 Main Street,
Toms River, N.J. 08753
Attn: Richard A. Grossman, Esq.

Jonathan L. Goldstein, Esq.,
United States Attorney,
Post Office Building,
Trenton, N.J. 08605
Attn: Ronald L. Reisner, Esq., A.U.S.A.

Re: Martinez v. Schrock et al.,
Civil 74-1282

Gentlemen:

This is an action brought against two physicians on an allegation of their malpractice while both were officers in the Medical Corps of the United States Army. They have moved for a dismissal contending that in their capacities as Army doctors, they are immune from personal liability.

The matter was commenced in the Superior Court of New Jersey and removed to this court pursuant to 28 U.S.C. Section 1441(a), 28 U.S.C. Section 1442(a) and 28 U.S.C. Section 2679. Plaintiff has not moved to remand to the state forum This Court therefore need only be concerned with the motion to dismiss.

It has long been the law in almost every Circuit that a federal official is immune from any personal liability for acts done within the outer perimeter of his official authority and in pursuance of his official duties. *Barr v. Mateo,* 360 U.S. 564 (1959); *Howard v. Lyons,* 360 U.S. 593 (1959). This immunity is absolute and extends to all

levels of government. *Barr, supra, Koningsberg v. Hunter,* 308 F. Supp. 1361 (W.D.Mo. 1970), and this principle was firmly stated in this Circuit some time ago. *Keiser v. Hartman,* 339 F.2d 597 (3d Cir. 1964).

Only one case deviates from the great wealth of authority granting immunity to all levels of government. See, *Henderson v .Bluemink,* (D.C. Cir. No. 73,1816) decided July 26, 1974. In view of these authorities to the contrary and a careful analysis of the courts' reasoning in *Henderson, supra,* this Court is led to the view that *Henderson, supra,* is not persuasive.

Certainly Army doctors in the performance of their duties, whether they be voluntary enlistees or those dragooned into service by way of the Draft, clearly should be immune from personal liability. The statement in *Henderson, supra,* that ". . . a fortiori, the threat of liability for negligence would not deter the fearless exercise of medical discretion within government service any more than the same threat deters the exercise of medical discretion outside of government," is remarkably inaccurate in view of the almost universal insurance coverage of doctors. It is difficult to see how medical officers could properly perform their duties, sometimes in the most desperate of conditions and circumstances, under the constant threat of actions in malpractice. Clearly, the immunity should inure to their benefit.

The plaintiff, although entitled to bring an action against the United States under the Federal Tort Claims Act, either originally or by way of an amendment to this suit, has not seen fit to do so and the motion to dismiss must be and is granted.

The Statute of Limitations, 28 U.S.C. Section 2401, has not yet run and the plaintiff may still pursue her proper

remedy but only after filing of the proper claim with the appropriate federal agency, which is a jurisdictional prerequisite, 28 U.S.C. Section 2675, to relief.

Submit an order.

Very truly yours,

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
U.S.D.J.

CSF/efr

COMPLAINT AND DEMAND FOR JURY

Plaintiff, residing at 608 Texas Drive, Toms River, Township of Dover, County of Ocean, State of New Jersey, complaining of the defendants says:

FIRST COUNT

1. On or about July 9, 1974, Letters of Administration ad Prosequendum were granted by the Surrogate of Ocean County to plaintiff for the purpose of prosecuting a claim of the widow, children and next of kin and dependents of Miguel Martinez, Jr., deceased, against defendants for the death of Miguel Martinez, Jr., as hereinafter mentioned.

2. This action has been commenced within two years after the death of the said Miguel Martinez, Jr.

3. At all times relevant hereto, defendants were licensed physicians practicing medicine in the State of New Jersey.

4. On or about January 20, 1974, the said Miguel Martinez, Jr. became a patient of defendants, who agreed to treat him for a physical disorder which in their opinion required surgical intervention. From that time onward, defendants owed to said patient the duty to exercise that degree of care and skill generally practiced by physicians doing operative procedures in the general medical community.

5. On or about January 21, 1974, said defendants performed an operation upon said patient and undertook to administer aftercare. Said operation and aftercare were performed by defendants in a negligent manner, violating the professional standard of care owing to said patient. Said professional negligence consisted, among other matters, of causing said patient to contract a violent infection and improperly and insufficiently diagnosing and treating said infection thereafter.

6. As a proximate result of said professional negligence as aforesaid, the said Miguel Martinez, Jr. died on or about January 23, 1974, to the pecuniary damage of his dependents.

WHEREFORE, plaintiff demands judgment against defendants for damages and costs of this action.

SECOND COUNT

1.-6. Plaintiff, Raphaela Martinez, General Administratrix of the Estate of Miguel Martinez, Jr., deceased, repeats each and every allegation of the First Count and makes them a part hereof.

7.On July 9, 1974, Letters of Administration were issued to said plaintiff by the Surrogate of Ocean County, appointing her General Administratrix of the Estate of Miguel Martinez, Jr., deceased.

8. As a result of the professional negligence of defendants as aforesaid, the said Miguel Martinez, Jr., deceased, was caused to live in great pain for two days until the day upon which he died. During that time he suffered greatly and endured much pain.

WHEREFORE, plaintiff demands judgment against defendants for damages and costs of this action.

DEMAND FOR JURY

Plaintiff hereby demands a jury of twelve (12) jurors as to all issues.

NOVINS, NOVINS,
FARLEY & GROSSMAN
Attorneys for Plaintiff

/s/ Richard A. Grossman
RICHARD A. GROSSMAN
For the Firm

PETITION FOR REMOVAL

The petition of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, attorney for defendant, Ankia Chandrasekaran, respectfully shows:

1. Ankia Chandrasekaran is a defendant in an action now pending in the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-36373-73 entitled Raphaela Martinez, Administratrix ad Prosequendum and General Administratrix of the Estate of Miguel Martinez, Jr., deceased, Plaintiff v. Lawrence Schrock, M.D. and Ankia Chandrasekaran, M.D., defendants.

2. A copy of the summons and complaint were served upon the defendant, Ankia Chandrasekaran on August 2, 1974.

3. Ankia Chandrasekaran, M.D. is an officer of the United States or an agency thereof or a person acting for such an officer or a member of the Armed Forces of the United States within the meaning of 28 U.S.C. Section 1442. Any actions complained of and done by Ankia Chandrasekaran were done under the color of his office or status and within the scope of his employment with the United States as a member of the Armed Forces thereof.

4. This action, especially a federal tort claims case, is subject to removal pursuant to the provisions of 28 U.S.C. Section 1441(a) as an action over which the district courts of the United States have original jurisdiction. This action is also subject to removal pursuant to the provisions of 28 U.S.C. Section 1442a and 28 U.S.C. 2679.

NOTICE OF FILING VERIFIED PETITION FOR REMOVAL

To: Novins, Novins, Farley and Grossman, Esquires
(without copy or bond)
Attorneys for Plaintiff
202 Main Street
Toms River, New Jersey 08753
Clerk

Superior Court of New Jersey
Law Division
State House Annex
Trenton, New Jersey
(2 copies without copy of bond)

You are hereby notified that on the 20th day of August, 1974, a verified petition for removal in the above-entitled cause, a copy of which is enclosed, was filed in the United States Distict Court for the District of New Jersey.

JONATHAN L. GOLDSTEIN
United States Attorney
Attorney for Defendant,
Ankia Chandrasekaran

By: /s/ Ronald L. Reisner
RONALD L. REISNER
Assistant United States Attorney

Original filed August 20, 1974.

Angelo W. Locascio
ANGELO W. LOCASCIO
Clerk

WHEREFORE, petitioner requests that the action described in Paragraph 1 now pending against the defendant, Ankia Chandrasekaran in the Superior Court of New Jersey be removed therefrom to this Court.

JONATHAN L. GOLDSTEIN
United States Attorney

By: /s/ Ronald L. Reisner
RONALD L. REISNER
Assistant United States Attorney

STATE OF NEW JERSEY:

SS

COUNTY OF MERCER :

Ronald L. Reisner, being duly sworn according to law, upon his oath deposes and says:

1. I am an Assistant United States Attorney and am entrusted with the handling of this matter.

2. The factual allegations of the petition are true to the best of my knowledge, information, and belief.

3. Upon the information now available to me, with respect to the incident referred to in the complaint, Ankia Chandrasekaran was acting within the scope of his employment and under the color of his office or status within the Armed Forces of the United States at the time of the incident, as indicated in the affidavit of Colonel Leon M. Dixon which is attached hereot and made a part hereof.

/s/ Ronald L. Reisner
RONALD L. REISNER
Assistant United States Attorney

NOTARIZED

8 August 1974

AFFIDAVIT

SCOPE OF EMPLOYMENT STATEMENT

I, Colonel Leon M. Dixon, being of full age, hereby swear and depose that:

From 10 August 1972 to the present time, DOCTOR ANKIA CHANDRASEKARAN, 534 48 5430, Lieutenant Colonel, United States Army, Medical Corps, Walson Army Hospital, Fort Dix, New Jersey, has been on the medical staff of Walson Army Hospital and has not practiced medicine as a private individual. On 21 January 1974, 22 January 1974, and 23 January 1974, Lieutenant Colonel CHANDRASEKARAN was acting within the scope of his employment as a military doctor during the treatment of Miguel Martinez, Jr., at Walson Army Hospital, Fort Dix, New Jersey.

/s/ Leon M. Dixon
LEON M. DIXON
Colonel, MC
Commanding
Walson Army Hospital
Fort Dix, New Jersey 08640

NOTARIZED

NOTICE OF MOTION TO DISMISS COMPLAINT

To: Novins, Novins, Farley and Grossman, Esquires
Attorneys for Plaintiff
202 Main Street
Toms River, New Jersey 08753

PLEASE TAKE NOTICE that on the 7th day of October, 1974 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendants will move before the Honorable Clarkson S. Fisher of the United States District Court for the District of New Jersey, United States Court House and Post Office Building, 402 East State Street, Trenton, New Jersey for an order extending time to answer the complaint and dismissing the complaint against defendants for failure to state a claim upon which relief can be granted.

In support of this motion, the undersigned will rely upon the affidavits of Colonel Leon M. Dixon, one of which was filed with the Petition for Removal, and the affidavit of Ronald L. Reisner, together with a Memorandum of Law submitted herewith.

JONATHAN L. GOLDSTEIN
United States Attorney

By: /s/ Ronald L. Reisner
RONALD L. REISNER
Assistant United States Attorney

Original Filed September 1, 1974

8 August 1974

AFFIDAVIT

SCOPE OF EMPLOYMENT STATEMENT

I, Colonel Leon M. Dixon, being of full age, hereby swear and depose that:

From 10 August 1972 to the present time, DOCTOR ANKIA CHANDRASEKARAN, 534 48 5430, Lieutenant Colonel, United States Army, Medical Corps, Walson Army Hospital, Fort Dix, New Jersey, has been on the medical staff of Walson Army Hospital and has not practiced medicine as a private individual. On 21 January 1974, 22 January 1974, and 23 January 1974, Lieutenant Colonel CHANDRASEKARAN was acting within the scope of his employment as a military doctor during the treatment of Miguel Martinez, Jr., at Walson Army Hospital, Fort Dix, New Jersey.

/s/ Leon M. Dixon
LEON M .DIXON
Colonel, MC
Commanding
Walson Army Hospital
Fort Dix, New Jersey 08640

NOTARIZED

AFFIDAVIT

I, COLONEL LEON M. DIXON, being of full age, hereby swear and depose that:

On 20 January through 23 January 1974, DR. LAWRENCE SCHROCK was acting within the scope of his employment as a military doctor during the treatment of MIGUEL MARTINEZ, JR. at Walson Army Hospital, Fort Dix, New Jersey, and not as a private physician.

/s/ Leon M. Dixon
LEON M. DIXON
Colonel, MC
Commanding
Walson Army Hospital
Fort Dix, New Jersey 08640

STATE OF NEW JERSEY :
:ss
COUNTY OF BURLINGTON :

NOTARIZED

STATE OF NEW JERSEY:
SS
COUNTY OF MERCER :

Ronald L. Reisner, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am an Assistant United States Attorney and am entrusted with the handling of the above-referenced matter for the defendants.

2. On August 20, 1974 I mailed a stipulation extending time to answer to October 7, 1974 to counsel for the plaintiff.

3. On September 9, 1974 counsel for plaintiff stated in a telephone conversation that he had no substantive objection to extending the time for defendants to answer, but that because of his contentions with respect to the removal of his action as expressed in his August 26, 1974 letter to the Court, he would only execute a stipulation in the Superior Court of New Jersey.

4. This affidavit is made in support of defendants' motion for an order extending time to answer the complaint to and including October 7, 1974.

/s/ Ronald L. Reisner
RONALD L. REISNER

NOTARIZED

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATEMENT OF FACTS

Plaintiff brings this action against Doctor Ankia Chandrasekaran and Doctor Lawrence Schrock. At the time of the incident giving rise to this suit, both defendants were officers in the United States Army assigned to Walson Army Hospital Fort Dix, New Jersey. Dr. Ankia Chandrasekaran held the rank of Lieutenant Colonel, Medical Corps. Plaintiffs allege, *inter alia*, that Miguel Martinez, Jr. died as a result of the defendants' alleged failure to perform a gall bladder operation and to render post-operative care properly. Apparently, although it is not alleged, Miguel Martinez, Jr., a civilian employee at Fort Dix, was a retired Army sergeant and was therefore entitled to medical treatment at Walson Army Hospital, Fort Dix, in January, 1974.

This brief is submitted in support of the defendants' motion to dismiss, which, under F.R. Civ. P. 12(b)(6), can be treated as a motion for summary judgment under F.R. Civ. P. 56.

I. DEFENDANTS ARE IMMUNE FROM SUIT

The alleged acts of negligence which form the basis of the Complaint, were performed by the defendants acting within the scope of their authority as employees and agents of the United States of America.

It is well settled that no action can be brought or tried against a federal official for acts performed within the outer perimeter of his official authority and in pursuance of his official duties. *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959). As noted in *Barr*, *supra* at 572-73, this immunity from suit is absolute and

extends to all levels of government. *See, Konigsberg v. Hunter*, 308 F. Supp. 1361, 1363 (W.D. MO. 1970).

The privilege of official immunity was recognized by the Supreme Court long before *Barr* and *Howard*. *See, e.g., Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Spalding v. Vilas*, 161 U.S. 483 (1896). It has been recognized in every Circuit Court of Appeals in the country, and, in partcular, the Third Circuit upheld this privilege in *Keiser v. Hartman*, 339 F.2d 597 (3rd Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *see also Josephson v. Joslin*, 38 F.R.D. 344 (D.N.J. 1965).

This privilege not only protects a federal official from judgment, but also frees him from the burden of trial. In *Babylon Milk and Cream Co. v. Rosenbush*, 233 F. Supp. 735, 736 (E.D.N.Y. 1964) the Court stated:

> ". . . the principal is one that halts at the threshold any judicial inquiry into the existence of private injury consequent upon the officer's act . . . where it appears that the alleged private wrong grew directly out of the defendant's functioning in his discretionary office."

The principle of official immunity requires: (1) that the official be acting within the scope of his employment, and (2) that his duties be discretionary in nature. *Bivens v. Six Unknown Named Federal Agents*, 456 F.2d 1339, 1343 (2nd Cir. 1972).

It would appear clear from the record that Lieutenant Colonel Chandrasekaran's treatment of Miguel Martinez, Jr. was performed within the outer perimeter of his duties as an officer and medical doctor in the United States Army. (Affidavit of August 8, 1974 of Colonel Leon M. Dixon attached to petition of removal). Dr. Schrock also acted

within the scope of his duties. (Affidavit of August 21, 1974 of Colonel Leon M. Davis). Alleged tortious or unauthorized acts will not remove a federal official's conduct from the scope of his authority. *See, Gamage v. Peal,* 217 F. Supp. 384 (N.D. Cal. 1962); *Babylon Milk and Cream Co. v. Rosenbush, supra.*

The duties which defendants performed also meet the other criteria entitling them to immunity. *In Estate of Burks v. Ross,* 438 F.2d 230 (6th Cir. 1971), the administrative director of a government hospital and a treating psychiatrist in the hospital were held to be vested with discretionary duties and, therefore, to be immune. As to the treating psychiatrist the Court noted, "While Dr. Ging had less discretion, nevertheless in her diagnosis and treatment of patients and in her supervisory powers over other employees she was vested with discretion." 438 F.2d at 235.

In *Gamage v. Peal,* 217 F. Supp. 384 (N.D. Cal 1962), plaintiff brought a tort suit against, *inter alia,* a military doctor. Once it was determined that the doctor was acting wihin the scope of his employment, the Court held him to be immune from suit:

> "That medical officers in the Armed Forces . . . should be covered by the immunity rule would appear quite apparent if the rule, as presently applied by the United States Circuit Courts and the United States Supreme Court is to have consistent application. The immunity from liability for official acts is no longer limited to cabinet members, department heads or judges . . . but now extends to lesser officials in similar capacities as the defendants sued herein." 217 F. Supp. at 390.

See also, Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952); *Bates v. Carlow,* 430 F.2d 1331 (10th Cir. 1970); *Blitz v. Boog,* 328 F.2d 596, 600 (2nd Cir. 964), *cert. denied,* 379 U.S. 855 (1964).

Thus, it would appear to be without question that the defendants are immune from suit and the complaint should be dismissed.

Finally, it should be noted that should plaintiff desire to sue the United States, the two year statute of limitations, 28 U.S.C. Section 2401, has not yet expired.

CONCLUSION

For all of he foregoing reasons, the complaint should be dismissed against defendants.

Respectfully submitted,

JONATHAN L. GOLDSTEIN
United States Attorney

By: /s/ Ronald L. Reisner
RONALD L. REISNER
Assistant United States Attorney

MEMORANDUM OF LAW OF PLAINTIFF

STATEMENT OF FACTS

This is a medical malpractice action instituted for the wrongful death of Miguel Martinez, Jr. Defendants in this suit are doctors who were employed by the United States Army and assigned to Walson Army Hospital. The acts of negligence concern an improperly performed gall bladder operation and aftercare.

ARGUMENT OF LAW

Defendants have made a motion to dismiss the complaint upon the ground that defendants are immune from civil suit for any act of professional negligence committed while they were employees of the United States Army. It must be pointed out, prior to any discussion of the law, that the acts complained of constitute deviations from accepted medical standards and do not in any way concern acts of a discretionary nature having to do with policy decisions.

Defendants cite a number of cases in their memorandum which they contend indicate that they enjoy complete immunity from civil suit. It is submitted that none of these cases stand for the proposition that these defendants would enjoy total immunity. The leading case discussed is *Barr v. Matteo*, 360 U.S. 564 (1959). That was a suit for libel by employes of a federal agency against the head of that agency. In a 5 to 4 opinion, it was held that a privilege exists against suit for acts arising out of duties performed by government officials in the course of their duties. The majority stated that the question was a close one, but that freedom to exercise discretion in discharging the functions of government outweighed the right of an individual to sue for a tort which might grow out of the operation of a

governmental office. It is clear that this case stands for the proposition that immunity will follow those discretionary activities necessary to keep the government and its agencies functioning. The case of *Howard v. Lyons*, 360 U.S. 593 (1959) is a companion case to *Barr*.

There then follows a series of other cases where immunity was found to exist.

Spalding v. Vilas, 161 U.S. 483, 16 S. Ct. 631 (1896). Action by attorney for employees of the Post Office Department against the Postmaster. The Court said at page 637, "In exercising the functions of his office, the head of an executive department keeping within the limits of his authority should not be under apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages."

Kendall v. Stokes, 44 U.S. 87 (1845). Suit by contracting parties with Department of the Post Office against Postmaster General. Held, theory of case was actually breach of contract and immunity aplied to defendant.

Bradley v. Fisher, 80 U.S. 335 (1872). Suit by attorney against judge of the District Court.

Keiser v. Hartman, 339 F.2d 597 (3rd Cir. 1964). Libel action by employees of Department of Agriculture against fellow employees.

Josephson v. Joslin, 38 F.R.D. 334 (D.N.J. 1965). Action against I.R.S. agents for harassment in examining plaintiff's books and records.

In the case of *Bivens v. Six Unknown Named Federal Agents*, 456 F.2d 1339 (2nd Cir. 1972), Judge Medina found no immunity. The suits were against agents of various federal agencies for acts committed while pursuing suspects. At p. 1343 the Court held, "But we reject the

claim of immunity because we do not agree that the agents were alleged to be engaged in the performance of the sort of 'discretionary' acts that require the protection of immunity."

There then follows a series of cases dealing with medical officers. In *Estate of Burkes v. Ross*, 438 F.2d 230 (6th Cir. 1971) the decedent was a mental patient in a V.A. hospital. He escaped and was killed by a train. The theory of the case was that hospital policy did not keep him properly confined. The Court permitted immunity to protect the director of the hospital and chief psychiatrist who determined policy of confinement, *but did not allow immunity against nurses and other staff personnel.*

Likewise, in *Blitz v. Boog*, 328 F.2d 596 (2nd Cir. 1964) a false imprisonment suit against a psychiatrist was dismissed because policy decision to hold patient for examination or release him required protection of immunity. Again, *Gamage v. Peal*, 217 F. Supp. 384 (N.D. Cal. 1962) was an action against a base psychiatrist and other doctors for wrongfully diagnosing and treating a condition which prevented plaintiff from flying. Note that plaintiff did not allege misdiagnosis and treatment, nor did he allege a violation of any Air Force Regulation. At p. 389 the Court said:

> "To allow the fear or risk of personal liability for their official acts to inhibit military doctors from performing their duty and going forward and pursuing findings that might result in a determination of a flyer in today's Air Force would be contrary to the national interest. Such action would result in endangering the lives of the men and the public; it would hamstring the efficient operation of our Air Force; and would, therefore, have the effect of allowing the interest of the wronged individual to override the needs of the government and the public, which is contrary to the whole purpose of the immunity rule."

Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952) involved a libel action against a psychiatrist at a federal prison facility. Immunity was held to apply. However, this opinion may be subject to some question, since the court cited, as authority for its decision the case of *Cooper v. O'Connor*, 99 F.2d 135. That was a malicious prosecution suit against a federal prosecutor which clearly came within the ambit of *Barr*.

It is clear that none of the cases listed above concerned allegations of medical malpractice. Only *Bates v. Carlow*, 430 F.2d 1331 (10th Cir. 1970) involved malpractice. However, this was a *per curiam* opinion which did not discuss any of the facts of the alleged claim.

An analysis of the authorities suggests the concept with which we are dealing. Immunity from suit is a judge-made concept, rather than statutory or constitutional. It finds its genesis in the *Barr* decision, which extents immunity to such government officials who are required within the course of their duties to make discretionary policy decisions generally affecting the conduct of their duties. Clearly, the "discretion" involved must be of policy level, since every routine act performed by human beings involves some discretion—to stop or go, turn left or right, etc.

Viewed in this light, the present action should not be dismissed. Defendants are not being sued for an abuse of discretion. They are being sued for a deviation of accepted medical standards. If it were a matter of discretion, the suit could not be maintained. Moreover, any decisions made concerning the care of the decedent were not general in nature, affecting the hospital or ward as a whole, but were personal to this one case. As an analogy, one might consider the respective roles of attorney and

trial judge. The judge should be free from suit for decisions and statements made while performing his official duties. However, the attorney is subject to suit for malpractice if he violates a standard of care in representing his client before that judge.

For the reasons expressed herein, it is requested respectfully that defendants' motion be denied.

Respectfully submitted,

NOVINS, NOVINS,
FARLEY & GROSSMAN
Attorneys for Plaintiff

/s/ Richard A. Grosman
RICHARD A. GROSSMAN
For the Firm

ORDER GRANTING MOTION OF DEFENDANT

This matter having been opened to the Court by Jonathan L. Goldstein, United States Attorney for the District of New Jersey, counsel for the individual defendants, Ronald L. Reisner, Assistant United States Attorney appearing in the presence of Novins, Novins, Farley and Grossman, Esquires, counsel for plaintiff, Richard A. Grossman, Esquire appearing, and the Court having considered the affidavits filed and the briefs and oral arguments of counsel, and a letter opinion having been filed with the Clerk of the Court, for good cause shown;

It is on this 29th day of October, 1974 ORDERED that the time within which the individual defendants may answer or otherwise proceed herein be and the same hereby is extended *nunc pro tunc* to and including October 7, 1974; and

It is FURTHER ORDERED that the complaint against the individual defendants Lawrence Schrock, M.D. and Ankia Chandrasekaran, M.D. be and the same hereby is DISMISSED with prejudice and without costs.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
UNITED STATES
DISTRICT JUDGE

ORIGINAL FILED

NOTICE OF APPEAL OF PLAINTIFF

Notice is hereby given that Raphaela Martinez, etc., the above-named plaintiff, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of Dismissal in favor of the defendants and against the plaintiff entered in this action on the 29th day of October, 1974.

NOVINS, NOVINS, FARLEY & GROSSMAN

/s/ Richard A. Grossman
BY RICHARD A. GROSSMAN
For the Firm

DATED: November 7, 1974

Supreme Court, U. S.
FILED
DEC 23 1976
MICHAEL RODAK, JR., CLERK

No. 76-530

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAPHAELA MARTINEZ, PETITIONER

v.

LAWRENCE SCHROCK, M.D., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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RAPHAELA MARTINEZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (*en banc*) (Pet. App. A3-A21) is reported at 537 F. 2d 765. The opinion of the district court (Pet. App. A22-A24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1976. The petition for a writ of certiorari was filed as of September 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether military physicians are immune from personal liability in malpractice suits arising from their performance of official duties.

STATEMENT

As the opinion of the court of appeals states (Pet. App. A3), petitioner is the representative of a retired enlisted man who died shortly after a gall bladder operation performed on him by respondents, who are Army surgeons at Walson Army Hospital, Fort Dix, New Jersey. Petitioner brought survival and wrongful death actions in New Jersey state court, contending that respondents had been negligent in the performance of the operation and that the negligence had caused the death (see Pet. App. A25-A26). The case was removed to the United States District Court for the District of New Jersey (Pet. App. A22).

The district court granted respondents' motion to dismiss, holding that, as officers in the Medical Corps of the United States Army, respondents are immune from any personal liability for acts done within their line of duty (Pet. App. A22-A24). The district court noted that petitioner was "entitled to bring an action against the United States under the Federal Tort Claims Act" for the alleged malpractice (Pet. App. A23). (The court of appeals at the oral argument of this case was advised that petitioner had filed a timely claim under the Federal Tort Claims Act (Pet. App. A6).)

The court of appeals, sitting *en banc*, affirmed (Pet. App. A3-A21). Applying the "broad directives" from this Court in *Barr* v. *Matteo*, 360 U.S. 564, and *Doe* v. *McMillan*, 412 U.S. 306,[1] the majority concluded that

[1]The "starting point" in the majority's analysis was the Third Circuit's decision in *Bailey* v. *DeQuevedo*, 375 F. 2d 72, 74, certiorari denied, 389 U.S. 923, which held that "an enlisted man in the armed services of the United States cannot maintain an action against an Army medical surgeon for negligence in an operation performed at an Army hospital in line of duty" (see Pet. App. A3). The court recognized, however, that whereas the plaintiff in *Bailey* was an active duty soldier, the plaintiff here (petitioner) is a civilian representative of a retired enlisted man, and therefore that a principle rationale in *Bailey*—*i.e.*, that "one soldier may [not] sue another for negligent acts performed in the line of duty"—was unavailable as a ground for decision in this case (Pet. App. A4). The majority therefore proceeded to an analysis of the factors broadly outlined in *Doe* v. *McMillan*, *supra*, and *Barr* v. *Matteo*, *supra*.

there were "significant public policy considerations at work here which tip the balance in favor of immunity" (Pet. App. A5). In particular, the court reasoned that the threat of personal liability to military doctors, who generally do not have malpractice insurance,[2] would substantially impair the government's ability to recruit doctors for the military and might lower the level of health care in the armed services (Pet. App. A6-A7). The court held that the "contribution of immunity to effective government" in this regard "outweighs the * * * harm to individual citizens who, in fact, have recourse under the Federal Tort Claims Act" (Pet. App. A9).[3]

[2]In addition to the court's finding that "malpractice insurance is not involved here" (Pet. App. A6) the court referred to a finding in a House Committee on Armed Services Report (see Pet. App. A7-A8, n. 5) that generally there is no insurance coverage involved in malpractice suits against military doctors.

The court also concluded (Pet. App. A7) that "[i]t could hardly be suggested that the purchase of costly insurance would provide a solution for the more modestly compensated military doctor."

[3]Judge Adams concurred in the judgment of the court, but emphasized that he would strike the balance on the particular facts of each case (Pet. App. A10-A16).

Judges Seitz and Gibbons dissented on the ground that military doctors were not entitled to immunity because they were exercising medical, rather than governmental, discretion (Pet. App. A16-A21).

DISCUSSION

1. Petitioner contends principally (Pet. 3-6) that this Court should grant her petition for a writ of certiorari to resolve a conflict between the Third Circuit's decision in this case and the District of Columbia Circuit's decision in *Henderson* v. *Bluemink*, 511 F. 2d 399. *Henderson* also involved a malpractice suit against a military doctor. The court of appeals there held, in apparent contradistinction to the Third Circuit, that a military doctor was not immune from such suits merely because he is a government employee acting within the scope of his discretionary duties (511 F. 2d at 402-403).[4]

Although there thus appears to be a conflict among the circuits concerning whether military physicians are immune from malpractice suits arising from their performance of official duties, the question has recently been resolved for future cases by statute. On October 8, 1976, the President approved a law that immunizes physicians in the military from malpractice suits. Pub. L. 94-464, 90 Stat. 1985-1989. The new statute provides that "[t]he remedy against the United States provided by [the Federal Tort Claims Act] * * * for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician * * * of the armed forces * * * while acting within the scope of his duties * * * shall hereafter be exclusive of any other civil action * * * against such physician * * * ." *Ibid.* The immunity afforded military doctors by this new statute does not

[4]The court of appeals in *Henderson* remanded the case for the further consideration whether immunity was necessary in order "not to jeopardize 'the quality and efficiency of government itself' by exposing the exercise of discretion in the formulation of governmental policy to the * * * sanction of tort liability" (511 F. 2d at 402; emphasis omitted, quoting from *Spencer* v. *General Hospital of the District of Columbia*, 425 F. 2d 479, 481 (C.A. D.C.)).

pertain to the instant case because the statute "appl[ies] only to those claims accruing on or after [the] date of [the statute's] enactment." *Ibid.* But because of the statutory resolution of the issue, the apparent conflict among the circuits does not have prospective importance warranting this Court's resolution.

2. The government has filed a petition for a writ of certiorari in *Butz* v. *Economou*, No. 76-709, that presents somewhat related questions concerning the immunity of federal government officials from damage suits based upon acts done as a part of their official duties.[5] In *Economou* the Second Circuit held that federal officials sued for damages based upon their performance of official duties in connection with administrative enforcement proceedings have only a qualified, not an absolute, immunity (535 F. 2d 688). As we explained in our petition, the court of appeals in *Economou* believed (erroneously, we submit), that subsequent cases had overruled or limited *Barr sub silentio*.

Both the factual setting of *Economou* and the specific question presented in our petition in that case are quite different from the facts and question presented here. Nevertheless, the court of appeals in this case appears to have based its analysis at least in part upon the "broad directives from the Supreme Court" in *Barr* v. *Matteo*, *supra* (Pet. App. A5; see note 1, *supra*). Since the continuing validity and scope of *Barr* have been called into question by the court of appeals in *Economou*,

[5]Petitioner is being furnished with a copy of our petition in *Economou*.

this Court may deem it appropriate to hold this petition pending its disposition of *Economou*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

DOJ-1976-12